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Held at Headquarters, New York,
on Tuesday, 2 June 1998, at 10 a.m.

Chairman: Mr. MAZILU (Romania)

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PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

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The meeting was called to order at 10.15 a.m.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/444 and Add.1 and 2)

1. The CHAIRMAN invited members to comment on paragraphs 62 to 82 of document A/CN.9/444/Add.1.

2. Ms. GÜRAY (Observer for Turkey) said that, in prior discussions of the section on parties involved in infrastructure projects, it had been suggested that the section should be shortened or some of the paragraphs combined. However, since multiple parties could be involved, it seemed unwise to leave anything out of the guidelines, given the complexity of the subject.

3. Mr. KOVAR (United States of America) said that, although the aim in the document had been to be thorough, the key points risked being submerged in the wealth of background information provided. The essential point was that most privately financed infrastructure projects were financed by limited recourse loans, where repayment was primarily assured by the revenue generated by the project itself. Paragraphs 72, 73 and 74, which contained the essential points, should perhaps come first, followed by a discussion of that type of financing and of how such loans might be structured.

4. It should also be made clear that Governments' choices of legal and regulatory schemes would affect the ability to attract that type of financing, and that Governments' primary goal was to procure infrastructure at a reasonable cost, without stressing such collateral benefits as employment. Other members had mentioned that paragraph 65 was ambiguous, yet it contained an essential description of the risks faced by project sponsors, and its deletion would make it more difficult for national and local authorities to understand those risks.

5. The CHAIRMAN invited members to comment on paragraphs 91 to 110.

6. Mr. WALLACE (United States of America) said, with regard to paragraph 98, that competitive proposals might be involved even in projects to provide services rather than infrastructure.

7. Mr. LALLIOT (France) said that, while he agreed with the substance of paragraphs 98, 100, 102 and 108, the terminology used presented some problems, he had submitted some possible drafting alternatives to the Secretariat. There was a contradiction between paragraphs 107 and 60, as Government subsidies could also be a source of funds. It would therefore be preferable to speak of the "principal" rather than the "sole" source of funds.

8. Ms. GIOIA (Italy) said that the reference to the selection of a concessionaire (para. 98) presupposed that a competitive tender would always be carried out. However, in cases involving exclusive rights to technology, Italian law, like that of many other countries, did not allow such an approach. It would also be useful to develop a special procedure for transferring such exclusive rights at the end of a project (paras. 109 and 110). The adoption of

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more precise terminology regarding patents and know-how would be useful for Governments.

9. Mr. CHOUKRI (Observer for Morocco) said that the selection of a concessionaire was the most important phase of a project. The host Government should be able to establish equitable, fair procedures, in accordance with the UNCITRAL Model Law on Procurement, to which a reference should be made in paragraph 98. The paragraph confined itself to the action of the host Government and the private sector, but the judiciary might also be involved in the bidding process, since international and local norms intended to guarantee transparency also allowed investors to have recourse to the courts.

10. Mr. LALLIOT (France), referring to the extension of existing concessions (para. 109), said that in France, concessions to build and operate highways had been awarded through contracts, many of which would soon expire. The duration and projected return on investment of such concessions had been miscalculated. The decision to extend the relevant contracts or to take a different approach was also influenced by the requirements of membership in the European Union. The economic and financial stakes were high, and his Government would be looking to the Commission for guidance on how to proceed, as would others in similar situations.

11. Mr. ESTRELLA FARIA (International Trade Law Branch) noted that the purpose of the chapter under consideration was to provide a brief overview of the issues. The questions raised by the representatives of Morocco and France would be considered in greater detail during the discussion of chapter III. The content of paragraph 109 should also be taken as descriptive rather than prescriptive.

12. Ms. NIKANJAM (Islamic Republic of Iran) said that more detailed criteria for technology transfers and the training of local personnel for BOT projects, which were very important for ensuring a proper transition, should be spelled out in paragraph 110.

13. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the point raised by Iran would be addressed later, in the discussion of the chapter on project agreements.

14. Mr. OLIVENCIA RUIZ (Spain) said that his delegation was aware that the section under consideration should be seen as descriptive rather than prescriptive, but shared the difficulties with terminology noted by the representative of France. It would be best to avoid the use of terms that could lead to confusion, and to limit the text to describing procedures. Each country could then formulate terminology appropriate to its national context.

15. The CHAIRMAN invited the Commission to consider the legislative recommendations in the first section of document A/CN.9/444/Add.2, in conjunction with the notes contained in the second section.

Recommendation 1 on constitutional issues (paras. 1 to 4 of the notes)

16. Mr. WALLACE (United States of America) said that the recommendations must enunciate concise principles that were suitable for use by legislators or as a basis for legislation. With regard to the recommendation on constitutional issues, the authority to enter into privately financed infrastructure arrangements, requiring a minimum of further Government approvals and making possible provision for inter-agency coordination of such approvals, was needed in order to reflect best practices. Governments must be as free as possible to act. It would be more appropriate for individual legislatures to study potential obstacles to the process as they arose than for the Commission to attempt to examine each and every obstacle.

17. Ms. ALLEN (United Kingdom) said that she had some difficulty with paragraph 2 of the notes and, specifically, with the reference to "constitutional provisions". A legislative review was of fundamental importance, and particular attention must be paid to the powers of local authorities to enter into contracts, and to the relationship between central and local government bodies, since lenders often needed to be convinced that local bodies were in fact able to enter into contracts. The ideas on administrative coordination expressed in paragraphs 22 and 23 of the notes should perhaps appear earlier in the text. The first step, however, was to review existing legislation at all levels to determine what gaps needed to be filled.

18. Ms. NIKANJAM (Islamic Republic of Iran), referring to paragraphs 1 and 2 of the notes on legislative recommendations, said that, while some constitutions might not place any restrictions on the participation of the private sector in infrastructure development, some might contain restrictions that applied to foreign investment. It was therefore necessary to add a sentence indicating that paragraphs 1 and 2 related to foreign investment in the host country.

19. Mr. ESTRELLA FARIA (International Trade Law Branch) said that paragraphs 1 and 2 had been drafted in such a way that constitutional restrictions could apply to anyone. The question of restrictions on foreign investment was taken up in a later recommendation.

20. Mr. OLIVENCIA RUIZ (Spain), referring to legislative recommendation 1 on constitutional issues, said that the formulation "it is advisable to review existing constitutional provisions" was too diplomatic. It was necessary to determine whether there were any constitutional restrictions on a project before considering other legislation that might pose obstacles to private sector participation in infrastructure development.

21. The Spanish version of the recommendation, after stating that it was advisable to review existing constitutional provisions, included the phrase "con miras a su eventual revisión" ("with a view to their possible revision"), which did not appear in the English and French texts. He proposed that the other language versions should be aligned with the Spanish text.

22. Ms. MUSOLINO (Australia), referring to paragraph 2 of the notes, said that the issue of reviewing constitutional provisions had been widely considered in many countries. Her delegation was therefore in favour of a more hortatory

drafting of the paragraph. Paragraph 2 should refer not only to constitutional provisions but also to national policies and practices that affected foreign investment.

23. Mr. AL-NASSER (Observer for Saudi Arabia) said that his delegation supported the comments made by the representative of the United Kingdom. Most, if not all, of the delegations participating in the current session would endeavour to coordinate their national legislation with the guide. Once the draft guide was adopted, Saudi Arabia would consider making the requisite changes in its national legislation. His delegation had taken due note of all the comments that had been made and would transmit them to the competent authorities in his country.

24. Mr. CHOUKRI (Observer for Morocco) said that the last sentence of paragraph 4 of the notes on legislative recommendations might be interpreted as requiring States to bring their constitutions into harmony with the guide. Such a requirement would be tantamount to interference in a State's internal affairs and an encroachment on its sovereignty. For that reason, he proposed that the last sentence of paragraph 4 should be deleted.

25. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the last sentence of paragraph 4 was not hortatory but merely historical. It was not questioning the authority of the State to grant concessions; rather, it concerned related provisions on the use of State property.

26. Mr. ADENSAMER (Austria) said that the recommendation on constitutional issues should not use hortatory language that called for a review of the underlying principles of States' constitutions. His delegation was therefore in favour of retaining the more flexible and diplomatic wording "it is advisable".

27. Ms. GUREYEVA (Russian Federation), referring to the recommendation on constitutional issues, said that, in order to dispel the concerns that had been expressed by a number of States, the words "review existing constitutional provisions" should be amended to read "review existing legislation".

28. Ms. PIAGGI de VANOSSI (Argentina) said that her delegation supported the statement by the representative of the Russian Federation. The Commission should not spend an undue amount of time on redrafting the text of the recommendation.

29. Mr. GILL (India) said that, in most States, the federal units of the State had the authority to provide the land needed for a particular project. The financing of projects was governed by the relevant financial regulations. In such situations, amending of the constitution was unnecessary.

30. Mr. KOVAR (United States of America) said that the discussion on the legislative recommendation on constitutional issues had illustrated that focusing on constitutions was not the best approach. It was more advisable to focus on the need for Governments to provide the legal authority to enter into privately financed infrastructure projects. That would require a State to review the laws that applied to such projects. While such laws might include constitutional provisions, they would always include national legislation and

regulations and, in some cases, local legislation and regulations. It might also be necessary to review the overall authority to allow non-national entities to provide typically public infrastructure and service benefits. Problems might arise with respect to the ownership or lease of public land and other facilities. Perhaps a redrafting of the recommendation to include those concerns might help alleviate the concerns that had been expressed by some delegations.

31. Mr. MORENO RUFFINELLI (Paraguay) said that it was obvious that, if constitutional provisions restricted private investment, it was the sovereign right of every State to retain or remove those provisions. His delegation agreed with the representative of Argentina that the Commission was spending too much time on an issue that seemed self-evident.

32. Ms. ALLEN (United Kingdom) said that it was not the purpose of the guide to persuade States to enter into privately financed infrastructure projects; that was the prerogative of each State. The guide only pointed out that, once a country decided that it wished to promote private sector investment in its infrastructure, it was essential to consider all the obstacles to such investment; the constitution might be one of those obstacles.

The meeting was suspended at 11.30 a.m. and resumed at 12 p.m.

33. Ms. GUILEN (Observer for Venezuela) said that the question as to whether constitutional amendments might be needed was answered in paragraph 5 of the notes, which explained that in some countries it had been found appropriate to adopt specific legislation. New draft laws must be carefully scrutinized to ensure that they did not conflict with constitutional requirements.

34. Ms. GÜRAY (Observer for Turkey) commented that constitutional issues were highly sensitive. It was necessary to devise a clear legislative framework, and in that sense she agreed with the representative of the United Kingdom. Paragraph 4 of the notes was quite acceptable as it stood, since it reflected the core concerns of all parties.

35. Mr. LAMBERTZ (Observer for Sweden) said that, in view of the sensitive issues involved, he would prefer somewhat milder wording. It was important not to give the impression that States would be called upon to amend their constitutions. The approach suggested by the United States representative was a good one. Another possibility, in the light of the suggestion made by the representative of the Russian Federation, was simply to tone down the language by stating, for instance: "It is advisable for a country wishing to attract private investment in infrastructure to review existing legislative provisions". The emphasis should be on reviewing the law, not amending the constitution, with a view to identifying possible restrictions.

36. Mr. OLIVENCIA RUIZ (Spain) sought to clarify what his delegation had already said. Before any of the provisions in the draft guide could be adopted, it was absolutely necessary - not just advisable - that all existing legislation be reviewed, to ensure that no legal obstacle existed either in the constitution or in law. The Commission should not, however, be suggesting constitutional amendments, even as a possibility.

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37. The CHAIRMAN concluded that, in the Commission's view, it was important to deal very carefully with the sensitive issue of constitutional requirements, while recommending a review of legislation in general.

Recommendation 2 on general and sector specific legislation (paras. 5 to 8 of the notes)

38. Mr. KOVAR (United States of America) said that the Commission might wish to reorganize the recommendations to reduce their number. If what was intended was a list of principles for the guidance of legislators, as recommendation 2 implied, there would be a case for combining the first two recommendations, which were interrelated. Was the Commission aiming for general legislation, to be supplemented by sector-specific legislation such as already existed in some countries, in contrast with the case-by-case approach? If so, it must decide how many of the points covered in the thirteen recommendations were to be covered in the general legislation.

Recommendations 3 and 4 on legislative authority to grant concessions (paras. 10 and 11 of the notes)

39. Mr. AL-NASSER (Observer for Saudi Arabia), commenting on the title of recommendations 3 and 4, said that the term "legislative authority" was not appropriate for States such as his own, where a Government agency such as the Ministry of Finance or Industry was mandated to deal with infrastructure projects, and especially with aspects related to private sector participation and non-national investors.

Recommendation 5 on the legal regime of the project (paras. 12 to 15 of the notes)

40. Mr. NIKANJAM (Islamic Republic of Iran) said that she would prefer to substitute looser wording for "legal regime" in reference to infrastructure project legislation.

41. Mr. LAMBERTZ (Observer for Sweden) said that the title of chapter I, "General legislative considerations", seemed to indicate that the chapter would deal with general principles, such as the need for clarity and stability in the law governing investment, the pacta sunt servanda rule, and so on. However, that was far from being the case and he wondered where the line was to be drawn between general legislation and the specific recommendations contained in the chapter. With regard to recommendation 2, general enabling legislation was not the only way of granting authorization for privately financed infrastructure projects; there were other private law methods, such as those mentioned in recommendation 12.

42. Mr. BARBOSA FARIA (International Trade Law Branch), replying to the representative of Sweden, said that chapter I had been drafted in such a way as to avoid technicalities wherever possible. It had been thought preferable to address problems such as legal certainty in the specific context in which they arose, such as the conduct of the parties to an agreement. With regard to recommendation 12, the Commission had earlier asked for a reference to other relevant areas of legislation to be included, but the question of privately

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financed infrastructure projects did not call for a detailed examination of contract law.

43. Mr. WALLACE (United States of America) said that the term "legislative authority to grant concessions" could be said to cover recommendations 1, 2, 3 and 4, and possibly recommendations 5 and 6 as well. What was sought was a general law authorizing or enabling the State to enter into a particular kind of transaction if it so wished. The Commission should therefore decide what the general enabling legislation should include, without drafting any specific principles. In some cases, as the observer for Saudi Arabia had pointed out, a State agency might be given authority to act and would thus be empowered to enter into agreements and to fulfil undertakings. In any case, the enabling legislation should provide for authority to act in a number of areas: to provide the site and the necessary facilities; to exercise eminent domain; to convey or assign a lease to the project company, together with all necessary property interests; and to cover the necessary security interests, such as step-in rights to enable a secured lender to take action against a project company and its assets. As implied in recommendation 5, a Government should also have the freedom to negotiate commercial terms, to agree to commercial arbitration and to exercise choice of forum. The requisite authority would also enable a Government to grant protection to investors, for instance, through stabilization clauses and the availability of foreign exchange, tax provisions for both foreign and domestic investors and, perhaps, other provisions such as the indexation of local currency payments and even measures to deal with bribery and corruption. Other issues to be considered were the duration of the arrangements in question and whether they should be exclusive; the method of selecting the project company; and the ability to grant guarantees and other assurances. All those aspects should be covered in the enabling legislation.

44. Mr. OLIVENCIA RUIZ (Spain) said that recommendations 3 and 4 in fact related to domestic law and were therefore based on recommendation 2, which mentioned the drafting of special laws for specific infrastructure sectors. Recommendation 2 stated that general legislation might be "supplemented" by such special laws; that statement presupposed the existence of general enabling legislation, which might not in fact exist.

45. The words "debe definir" in the Spanish version of recommendation 3 were too categorical; other parts of the draft used the more appropriate "deberia", which was closer to the meaning of the English word "should".

46. Mr. LALLIOT (France) said there were various inconsistencies in word usage which created confusion. Paragraph 9 of the notes spoke of the "enactment of special legislation or regulations", whereas heading (a), which followed that paragraph, used the term "legislative authority". Under French law, there was a hierarchy among the various kinds of legislation; that was surely the case in other countries too. One approach would be to use a generic term which covered many possibilities; another would be to amend the second term in order to avoid ambiguity, for example, by using the words "legislative or regulatory authority".

47. To a French legal expert, the first sentence of paragraph 9 was absolutely meaningless: when an entity was decentralized, it did not belong to the State.

The problem might arise from the use of the word "State." If the relevant phrase were redrafted to read: "the enactment of special legislation or regulations authorizing a public entity or public legal person to entrust the provision of public services to a third party", that would avoid such issues as how the State was defined and organized and what the relationship was between central bodies and decentralized entities.

48. Paragraph 11 of the notes, which discussed the remuneration of a contractor, would more properly be included under heading (b): "Legal regime of privately financed infrastructure projects". Lastly, he did not understand the final sentence of paragraph 13: did it mean that the ability of a public contracting entity to revoke or alter terms could arise only from contractual provisions?

49. Mr. ESTRELLA FARIA (International Trade Law Branch) replied that, in some countries, concessions granted unilaterally could be revoked by the Government, whereas that might not necessarily be the case for concessions granted under bilateral agreements. In other countries, a concession granted unilaterally could not be revoked, except under special circumstances, because it became an acquired right.

50. Mr. RESTREPO-URIBE (Colombia) suggested that, to avoid misinterpretations, the final sentence of recommendation 5 should be revised to read: "The enactment of general enabling legislation may provide an opportunity for establishing mechanisms to facilitate project execution at both the general and the specific levels".

51. Mr. KOVAR (United States of America) said that, although his delegation had no specific comments to make on the recommendations currently under discussion, its earlier remarks were applicable to the entire draft guide. Further drafting remained to be done, whether by the Commission, the Secretariat or a working group.

52. Mr. OLIVENCIA RUIZ (Spain) agreed that the text needed improvement. His delegation would submit its comments on word usage directly to the Secretariat. He also agreed that it would be best to avoid the word "State". In Spain, the local, municipal, provincial, autonomous and central authorities were all subsumed under the term "State". Furthermore, the term "concessionaire" was preferable to "company", because companies took many different forms.

53. Mr. LALJOT (France) asked how recommendation 8 related to recommendation 3 and whether the two should be merged.

54. Mr. ESTRELLA FARIA (International Trade Law Branch) replied that recommendation 8 referred to the authorities that were competent to grant concessions, whereas recommendation 3 referred to the general authority of the State - which was not the same in all countries - to award concessions.

The meeting rose at 1 p.m.